SIQOKOQELA MPHOKO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 6 AND 8 JUNE 2023

Bail Pending Appeal

T. Dube, for the applicant
T. M Nyathi, for the respondent

KABASA J: This is an application for bail pending appeal.

The applicant appeared before a Regional Magistrate sitting at Bulawayo Regional Court facing 3 counts of rape and one count of escaping from lawful custody. He pleaded not guilty to all the counts but was convicted on all four counts after a full trial. The 3 counts of rape were taken as one for purposes of sentence and a 20 year term of imprisonment was imposed. On the fourth count the applicant received a 2 month term of imprisonment which was ordered to run concurrently with the sentence of 20 years imprisonment imposed on the rape counts.

The applicant is aggrieved with both the conviction and sentence and has since noted an appeal. The grounds of appeal as regards conviction are:-

1. The court *a quo* erred at law in improperly admitting evidence of complaint adduced by the state, when such evidence did not meet the legal requirements for the admissibility of evidence of sexual complaints set out at law.

2. The trial court grossly misdirected itself at law in arriving at the conclusion that the witnesses were credible witnesses when their evidence was fraught with inconsistencies going to the root of admissibility of evidence.

3. The trial court erred at law in dismissing the accused person's defence out of hand without placing due weight if any, on accused person's explanation and circumstances under which the offences were allegedly committed.

4. The court *a quo* erred at law in arriving at a conclusion that the state had proved its case beyond reasonable doubt when given the totality of the evidence, the state dismally failed to do so.

As regards sentence the grounds are:-

1. The court *a quo* erred and misdirected itself in the exercise of its sentencing discretion by imposing an unconscionable sentence which is excessive and induces a sense of shock.

2. The court *a quo* erred in placing insufficient weight to the accused on the mitigatory factors whilst over emphasizing aggravating ones.

The applicant seeks to be admitted to bail pending the determination of his appeal. The state did not oppose the application submitting that the applicant has a fighting chance on appeal on the rape conviction but not on the charge which relates to escaping from lawful custody. The lack of prospects of success on this conviction does not however make the applicant ineligible for bail pending appeal as the penalty imposed of 2 months imprisonment is very likely to be commuted to community service on appeal as it is within the threshold of community service or to be reduced to a fine. In the event that the court grants the application, the state asked that a further condition be added to those proposed by the applicant and that condition be that he surrenders title deeds to his Hillside home.

Does the applicant have a fighting chance on appeal? In seeking to answer this question I considered the evidence that was led at the trial. I must hasten to add that my advertence to the evidence is not meant to critically analyse it as that will be for the appeal court.

The state led evidence from 3 witnesses whilst the applicant testified in his defence and called three defence witnesses. I have deliberately confined myself to the rape charges as the likelihood of the appeal possibly succeeding rests mainly on this conviction. Should the applicant have a fighting chance on the rape conviction the likelihood of him absconding recedes into the background.

The 3 state witnesses comprised of the complainant, her mother and the doctor who examined the complainant.

The complainant's evidence was briefly that she was staying with the applicant who is her uncle at the relevant time at his home in Hillside. She had not been staying there for long when on a day she could not recall the applicant came into the bedroom which was used by one of her cousins and asked her whether she had a secret. She answered in the negative whereupon he then said whatever he was going to do would be their secret. He proceeded to undress her, removed his trousers and inserted his penis into her vagina. He covered her mouth to muffle her screams and afterwards threatened to kill her if she reported the matter. On the second occasion he covered her mouth with a cloth and proceeded to rape her. This happened in the same bedroom as the first incident. On the third occasion he threatened to suffocate her with a pillow before proceeding to rape her. On each of the occasions he threatened her with death. Six people were staying at the house but on all 3 occasions they were not home as her cousins used to go for swimming lessons and the applicant's wife was the one who took them for swimming.

The matter came to light when her mother who resides in South Africa came and this was sometime in August. There was some discord between her mother and the applicant although she did not know the cause. Her mother eventually took her to Lobengula and from there they went to her grandfather's plot. She was not aware of what was discussed but her mother then took her to hospital where she was examined. She refused to divulge what had happened until her mother threatened to take her to the police who were going to beat her up. She then told the doctor what had happened but the mother was excused. Earlier on the mother was present as well as the examining doctor and a second doctor. From there her mother took her to Hillside Police Station to make a report.

The mother's evidence was to the effect that the complainant started staying with the applicant in April 2022 and she came home to Zimbabwe in August 2022 from South Africa. She visited the applicant's home and all was not well between them. She eventually saw the complainant who appeared unwilling to come near her as she said their fight with the applicant was stressing her. When she eventually talked to the complainant she thought she appeared drugged and was speaking in English. She called the applicant's parents, the applicant's father

and her father are brothers. She took the complainant to the applicant's father's plot and because of the child's strange behaviour it was agreed that she take her to hospital where she was examined. She had however noticed blood stains on her pant and on inquiring whether it was menstrual blood the complainant said it was not. At the hospital about 7-8 counsellors talked to the complainant before she was examined by a doctor who told her that she had been sexually abused as she was no longer a virgin. The complainant denied that she had been sexually abused until she threatened to take her to the police, the complainant then told her that the applicant had raped her. Together they went back to the doctor and the complainant repeated the rape allegations.

The doctor also testified. She examined the complainant on 30th August and observed that she had been sexually abused as the hymen was not visible indicating penetration. The complainant did not want to disclose the perpetrator. She then advised the mother to go and tell the police that the report was ready and they left her rooms. Shortly thereafter the complainant came back and told her that the perpetrator was her uncle. She advised her mother to take her to the police.

The applicant and the other 3 witnesses' evidence sought to show that the rape allegations were fabricated due to family discord. The applicant's father to whom the complainant was taken by her mother before the rape allegations surfaced had earlier intimated that the applicant could face criminal charges. The father was unhappy with him following the applicant's quest to find his biological mother. This had caused a rift in the family so the rape allegations were a way to get back at him.

He never had an opportunity to be alone with the complainant due to his busy work schedule coupled with school runs which also involved taking the children for swimming lessons. He also has CCTV cameras at his home which could easily have shown that he was never alone with the complainant nor did he enter into this bedroom where the complainant was.

The applicant's step-daughter confirmed the living arrangements at the applicant's home and the family activities which hardly ever allowed the opportunity for applicant to be alone at home with the complainant.

The other two witnesses were teachers at the school the complainant was attending and one of them took the complainant and applicant's children for extra lessons. Most of the time the applicant was not at home, the complainant will either be with her for extra lessons or she will be away on swimming lessons, such that she was not aware of any occasions when the applicant was home alone with the complainant.

The other teacher's evidence related to the day the complainant's mother came to see her at school. She observed that something was off between mother and daughter and as she did not know that that was the complainant's mother that behaviour caused her some measure of concern. The complainant used to be confident but did not appear so on this day. She later learnt that the mother had not seen her for a while.

It is the totality of this evidence that Mr Dube, counsel for the applicant argued that it did not prove the accused's guilt beyond a reasonable doubt as there were inconsistences regarding how the rape report was made, the report itself was induced by threats and was therefore inadmissible.

The applicant spoke of CCTV facilities at his home and no investigations were done to at least view the footage and see whether evidence was supportive of the complainant's story regarding her and applicant's presence at home and his entrance into the bedroom where the sexual abuse is said to have occurred.

The complainant's mother also talked of a blood stained pant hours before the complainant was examined and yet the doctor saw no fresh hymenal tears or evidence of fresh tears indicative of a recent assault as evidenced by the presence of blood the mother had allegedly observed. The doctor did not see any sign of blood on examining the complainant.

The applicant therefore has a fighting chance on appeal and is therefore a good candidate to be admitted to bail pending appeal, so counsel argued.

In considering applications of this nature it is accepted that the presumption of innocence no longer applies. (*State* v *Kilpin* 1978 RLR 282, *State* v *Manyange* HH 1-03, *State* v *Poshai* HH 89-03).

It is for this reason that section 115 C of the Criminal Procedure and Evidence Act, Chapter 9:07 shifts the onus to the applicant to show on a balance of probabilities that it is in

the interests of justice for him to be released on bail pending appeal. In the absence of positive grounds for granting bail, bail should be refused (*S* v *Tengende and Ors* 1981 ZLR 455 (S), *Mahachi* v *S* HB 111-04)

In considering whether the applicant has discharged this onus it is important to look at the factors the court considers in an application of this nature. These factors are:-

1. The prospects of success
2. The likelihood of absconding
3. The liberty of the individual
4. Likely delay in the finalisation of the appeal.

In *S* v *Williams* 1980 ZLR 466 (A), the court had this to say:-

> "The proper approach should be towards allowing the liberty to persons where it can be done without any danger to the administration of justice. In my view, to apply this test properly it is necessary to put in balance both the likelihood of the applicant absconding and prospects of success. Clearly the two factors are interconnected because the less likely are the prospects of success the more inducement there is on the applicant to abscond. In every case where bail after conviction is sought, the onus is on the applicant to show why justice requires that he should be granted bail."

There are indeed inconsistencies as regards the making of the report. Was the report made to the mother first after the threat or it was made to the doctor and the mother eventually called in? Were 2 doctors present or it was only the examining doctor? This being important in view of the applicant's assertion that the other doctor is a family member who was part of the conspiracy against him. The complainant said there were 2 doctors present whilst the mother said it was just the examining doctor. The blood that the mother allegedly saw was said to be possibly menstrual blood but the complainant refuted that assertion. It was not clarified whether there was indeed blood on her pant and if so the source of that blood. The report itself was not as per the requirements as set out in *S* v *Banana* 2000 (1) ZLR 707 (S). Whilst it is not in every case that a report which is induced by threats is inadmissible as the circumstances of each case may very well be such that the threats do not vitiate the voluntariness of the report, in an application for bail pending appeal the court cannot ignore the real possibility that the report by the complainant may be adjudged as inadmissible given the circumstances already highlighted.

The family relations discord is clear on record and the mother's seemingly strained relationship with the the applicant is also clear on record. She appeared to be determined to portray the applicant as a person who was very capable of rape due to his previous behaviour and attempts by the prosecutor to stop her from digressing were in vain.

After going through the entire proceedings it was evident there was no more than the complainant's word as to who had violated her and given the applicant's explanation as to why he believes the child was influenced to implicate him, it cannot be said the appeal is predictably doomed to fail. The applicant in my view has an arguable case.

In *Gumbura* v *S* SC 78-12 the court succinctly put the test thus:-

> "The test to be applied in this regard is relatively uncomplicated: Is the appeal reasonably arguable and not manifestly doomed to fail."

Where the applicant has a fighting chance the temptation to abscond and therefore pose a threat to the proper administration of justice become less pronounced and recede to the background.

Conversely, where the applicant has a fighting chance, the likely delay in finalising the appeal and the liberty of the individual come to the fore.

Granted, the applicant was also convicted of escaping from lawful custody but the circumstances thereto are an important indicator as to whether he is to be regarded as a person who will flee once given the opportunity.

I did not deem it necessary to go into the evidence on this charge. Counsel for the applicant appeared not to strongly view the chances of success on this conviction as he hardly made reference to it in his oral submissions.

I will say this though, that the evidence of the two police officers who testified was very clear. The applicant wanted to get warm clothes and medication from home and his wife was asked to bring these. He was then escorted outside as he had already been detained on the rape charges but once he got an opportunity to get into the vehicle his wife had come driving he drove off and the police officer who had escorted him had to jump out of the way to avoid being run over.

However before all this the applicant was clearly agitated, shouting that they wanted to kill him. His behaviour appeared to show a person who was distressed and probably panicking. He surrendered himself the following day an indication that he had "sobered up." This, to me, tends to show that one should not read too much into the escape from lawful custody charge. Yes evidence shows he escaped but the circumstances are not such as to show that he is a flight risk.

That said, I am not of the view that the proper administration of justice will be prejudiced if he is released on bail pending appeal.

Whilst the prospects of success on the escape from custody conviction are next to nil, the point is he is likely to be fined for that offence based on the circumstances already highlighted.

The penalty for this offence is a fine not exceeding level ten or imprisonment not exceeding 5 years. The fact that the court *a quo* imposed a 2 month term of imprisonment is very telling. The reasoning is very likely that since on the rape charges the applicant had 20 years to serve, imposing a fine would not have made much sense and that is why the 2 months were ordered to run concurrently with the 20 year sentence.

The applicant is unlikely to consider the lack of prospects of success on the escape from custody conviction as a threat worth taking flight and not wait for the outcome of the appeal.

I therefore am of the view that the administration of justice is unlikely to be frustrated. (*A-G* v *Phiri* 1987 ZLR 33.)

I tried not to go into detail on the evidence led as it is not the function of this court to analyse such evidence in detail. This is best left to the appeal court. (*S* v *Viljoen* 2002 (2) SACR 550 (SCA).

Ultimately whilst the rape charges are of a serious nature and the penalty imposed is heavy, the fact that the applicant has a fighting chance on appeal ought not to be allowed to take lesser importance as the very prospects of success are in themselves the basis for considering the interests of the applicant's liberty.

Had there been a demonstrable danger that he is likely to abscond the court would have taken a different view and probably deny bail.

However the circumstances of this case make the applicant a good candidate for bail pending appeal. The state's concession was therefore properly made and has also influenced the court's decision to accede to the applicant's application.

The additional condition regarding the surrender of title deeds should also work towards allaying any fear of the applicant absconding.

The application for bail pending appeal is accordingly granted on the following conditions:-

1. The applicant shall deposit a sum of RTGS200 000 with the Deputy Registrar of the High Court.

2. The applicant is to reside at 3 Derby Road Hillside Bulawayo until the appeal is finalised.

3. The applicant is to report once every month on the last Friday of each month at Hillside Police Station between 6 a.m. and 6 p.m.

4. The applicant shall surrender the title deeds, to his house, 3 Derby Road Hillside to the Deputy Registrar of the High Court.

Ncube and Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners